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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 817

THE AMERICAN OIL COMPANY, *Petitioner*,

v.

THE UNITED STATES OF AMERICA and THE HONORABLE JOHN J. SIRICA, Judge of the United States District Court for the District of Columbia,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PERRY S. PATTERSON
HERBERT J. MILLER, JR.
RAYMOND G. LABROCA
of
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS
800 World Center Building
Washington 6, D. C.

Attorneys for Petitioner

RODNEY M. NASH
JAMES K. EAGAN, JR.
555 Fifth Avenue
New York, New York

Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Pertinent Statutory Provisions	2
Statement of Facts	3
Reasons Why the Writ Should be Granted	7
A. The Tables to the U.S. Code Cannot Supersede the Statutes at Large	7
B. The Interlocutory Appeals Act of 1958 Neither Amends Nor Repeals the All Writs Statute	10
Conclusion	12
Appendix A	1a
Appendix B	9a

CITATIONS

CASES:

Carroll v. *United States*, 354 U.S. 394 (1957)	12
Hassett v. *Welch*, 303 U.S. 303 (1938)	9
In re Heath, 144 U.S. 92 (1892)	9
Kendall v. *United States*, 37 U.S. (12 Pet.) 524 (1838)	9
Potler v. *Gardner*, 222 Ky. 487 (1927)	10
Stephan v. *United States*, 319 U.S. 423 (1943)	8
United States ex rel. Kessler v. *Mercur Corp.*, 83 F. 2d 178 (2d Cir. 1938)	9
United States v. *Rainwater*, 244 F. 2d 27 (8th. Cir. 1957)	9
United States v. *United States District Court*, 206 F. 2d 303 (9th Cir. 1953)	11

STATUTES:

Act of August 30, 1890, 26 Stat. 412	2, 4, 5, 7, 8, 9
Act of March 1, 1929, Title 16 §§ 619-644, D.C. Code (1951 ed.)	2, 3, 4, 5

Page

Act of July 30, 1947, 61 Stat. 633, as amended 1 U.S.C. § 112, (1952) 3, 8
Act of July 30, 1947, 61 Stat. 633, as amended 1 U.S.C. § 204(a) (1952) 3, 8
Act of July 30, 1947, 61 Stat. 633, as amended 1 U.S.C. § 205 (1952) 3, 9
All Writs Statute, 28 U.S.C. § 1651 (1952) 2, 3, 6, 10, 11, 12
The Capper-Crampton Act of 1930, 46 Stat. 482 3
The National Capital Park and Planning Act of 1924, Section 2, 43 Stat. 463, 40 U.S.C. § 72 (1952) 2, 3, 4, 5, 7
National Capital Planning Act of 1952, Section 2, 66 Stat. 791, 40 U.S.C. § 72 (Supp. V 1958) 2, 3, 4, 5, 7
The Interlocutory Appeals Act of 1958, 28 U.S.C.A. § 1292(b) (Supp. 1958) 2, 6, 10, 11, 12
28 U.S.C. § 1254 (1952) 1
Zoning Regulations of the District of Columbia, §§ 1302.1, 2101.11, 3101.2, 7101, and § 7 of Zoning Map 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The American Oil Company, petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 6, 1959.

OPINIONS BELOW

The rulings of the court of appeals and the district court are found at pages 1a and 2a respectively of the Appendix hereto. The district court's opinion has been reported at 87 Wash L. R. 100. Neither opinion has been officially reported as yet.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1952).

QUESTIONS PRESENTED

1. Where 40 U.S.C. § 72 authorizes a federal agency to acquire land . . . "by condemnation proceedings, such proceedings . . . to be in accordance with the provisions of act August 30, 1890, ch. 837, 26 Stat. 412 . . . " does the agency have the right to base its condemnation proceedings on another more favorable statute for the reason that the Act of August 30, 1890 is listed in the tables of the United States Code as eliminated because "obsolete, executed, superseded, etc."?

2. Where the district court granted a summary judgment on the issue of the right to condemn overruling petitioner's challenge to its jurisdiction and the court refused to issue a certificate of appealability under the recently enacted Interlocutory Appeals Act of 1958, 28 U.S.C.A. § 1292(b) (Supp. 1958), did the court of appeals lack jurisdiction to entertain a petition under the All Writs Statute 28 U.S.C. § 1651(a) because of the lower court's refusal to grant such a certificate?

PERTINENT STATUTORY PROVISIONS

The following statutes are set forth in Appendix B hereto.

1. Section 2 of the National Capital Park and Planning Act of 1924, 43 Stat. 463, 40 U.S.C. § 72 (1952)
2. Section 2 of the National Capital Planning Act of 1952, 66 Stat. 791, 40 U.S.C. § 72 (Supp. V, 1958)
3. Act of August 30, 1890, 26 Stat. 412
4. Act of March 1, 1929, Title 16, § 619, D. C. Code (1951 ed.)

5. Act of July 30, 1947, 61 Stat. 633, as amended, 1 U.S.C. § 112, (1952).
6. Act of July 30, 1947, 61 Stat. 633, 1 U.S.C. §§ 204(a), 205, (1952)
7. Interlocutory Appeals Act of 1958, 28 U.S.C.A. § 1292(b) (Supp. 1958).
8. All Writs Statute, 28 U.S.C. § 1651(a) (1952)

STATEMENT OF FACTS

This case had its genesis on October 9, 1958 when the United States at the request of the National Capital Planning Commission (hereinafter "Commission") filed a complaint in condemnation against certain real property, improved by a service station, owned and operated by petitioner. (R. 1). Accompanying the complaint was a declaration of taking pursuant to which the court *ex parte* ordered petitioner to surrender possession on or before January 15, 1959. (R. 14).

In its complaint, the United States premised the jurisdiction of the district court on four statutes.[1]

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[1] 1. The National Capital Park and Planning Act of 1924, Act of June 6, 1924, 43 Stat. 463 (as amended by Act of April 30, 1926, 44 Stat. 374), 40 U.S.C. §§ 71-74 (1952).

2. The National Capital Planning Act of 1952 which amended the 1924 statute, Act of July 19, 1952, 66 Stat. 781, 40 U.S.C. §§ 71-74a (Supp. V, 1958).

3. The general condemnation statue applicable to the District of Columbia, Title 16, §§ 619-644 of the D.C. Code. (1951 ed.), Act of March 1, 1929 (45 Stat. 1415).

4. The Capper-Crampton Act of 1930, Act of May 29, 1930, 46 Stat. 482, which statute authorized under certain conditions the expenditure of funds in accordance with the National Capital Park and Planning Act of 1924.

The statute granting the Commission power to condemn is codified in 40 U.S.C. § 72 (1952) which provides in part:

> "Said commission is authorized to acquire such lands . . . by condemnation proceedings, such proceedings to acquire lands . . . to be in accordance with the provisions of act August 30, 1890, ch. 837, 26 Stat. 412, the Chief of Engineers of the Army being, for the purposes of sections 71, 72, 73 and 74 of this title, clothed with all the power vested by the said act of August 30, 1890, in the board thereby created."

The United States, while predicating the authority of the Commission to acquire land on the foregoing statute nevertheless alleged that the district court had jurisdiction under the general condemnation statute applicable in the District of Columbia, Title 16, §§ 619-644 of the D. C. Code (1951 ed.) The United States did not invoke the Act of August 30, 1890, 26 Stat. 412, undoubtedly because that statute does not authorize a declaration of taking.

In its answer to the complaint petitioner challenged the jurisdiction of the district court to entertain the complaint and the declaration of taking on the ground that the proceeding was not in accordance with the Act of August 30, 1890, as specifically required by 40 U.S.C. § 72 (R. 15). The United States filed an alternative motion for summary judgment or to strike from petitioner's answer the challenge to the jurisdiction of the district court (R. 21). The court granted the United States a summary judgment on the issue of the right to condemn and issued an opinion, holding that the United States had properly proceeded under a general condemnation statute enacted in 1929,

Title 16, §§ 619-644 of the D. C. Code (1951 ed.) (App. p. 2a). The principal basis of the court's ruling was that the "tables" appended to the U. S. Code listed the Act of August 30, 1890, along with hundreds of other statutes, as "eliminated because obsolete, executed, superseded, etc.", and, consequently, the Act of August 30, 1890, was of no effect even though still incorporated into 40 U.S.C. § 72. The court further ordered petitioner to surrender possession of the service station to the United States on February 9, 1959. (R. 64).

The district court did not deem significant the fact that Congress in 1952 re-enacted the very statute codified in 40 U.S.C. § 72. Thus by the National Capital Planning Act of 1952, Act of July 17, 1952, 66 Stat. 781, Congress substantially rewrote the Planning Act of 1924, Act of June 6, 1924, c. 270 § 1, *et seq.*, 43 Stat. 463, which created the Commission. Congress in the 1952 amendment not only failed affirmatively to delete any reference to the Act of August 30, 1890, but reaffirmed 40 U.S.C. § 72 by renumbering section 2 of the 1924 Planning Act, 43 Stat. 463 upon which section 40 U.S.C. § 72 is based. 66 Stat 791.

When the condemnation was filed, the Commission announced that upon taking possession of the real estate, it would immediately demolish the service station located thereon. The service station, which has been operated at this location since 1920, is a nonconforming use and it would be legally impossible for petitioner to restore the station once it had been demolished, since such restoration would contravene the zoning laws and regulations of the District of Columbia. See §§ 1302.1, 2101.11, 3101.2, 7108 and § 7 of the Zoning Map, Zoning Regulations of the District of Columbia.

Consequently, even were petitioner successful in its challenge to the jurisdiction of the district court on appeal after the final condemnation award had been made, it would be a hollow victory since the station would be forever lost.

This classic case of irreparable injury is further highlighted by the fact that the service station is located at a unique and valuable position on two of the main arterial highways in the District of Columbia, Massachusetts Avenue and Wisconsin Avenue, N. W. (R. 53).

Petitioner moved the district court for a certificate of appealability under the Interlocutory Appeals Act of September 2, 1958, 72 Stat. 1770, 28 U.S.C.A. § 1292 (b) (Supp. 1958). This motion was denied. (R. 65).

Petitoner immediately filed a petition for an extraordinary writ in the court below requesting that a writ be issued pursuant to the All Writs Statute, 28 U.S.C. § 1651, prohibiting the district court from improperly exercising jurisdiction in the cause. (R. 66-75). The United States opposed the issuance of such a writ primarily on the ground that the Interlocutory Appeals Act of 1958 deprived the court of appeals of its jurisdiction to issue an extraordinary writ under 28 U.S.C. § 1651 where the district court had failed and refused to issue a certificate of appealability as provided for the Interlocutory Appeals Act. (R. 107). The court of appeals in a *per curiam* decision denied petitioner's application for an extraordinary writ but extended the time during which petitioner could remain in possession until March 1, 1959. (App. p. 1a).

Petitioner filed an application to stay the United States from taking possession of the property in ques-

tion with this Court, which stay was granted on May 7, 1959. The order of this Court provided, *inter alia*, that the United States should not take possession of the real property until the final disposition of petitioner's petition for certiorari which was required to be filed on or before April 6, 1959.

REASONS WHY THE WRIT SHOULD BE GRANTED

The decision of the district court, affirmed by the court below, establishes a startling principle of widespread application. This precedent, one which permeates the entire judicial spectrum, is that the "tables" to the U. S. Code not only have official status, but as here, effectively repeal laws contained in the Statutes at Large even where such laws have been incorporated in another statute by reference.

Of equal importance is the impact the action of the court below will have on federal appellate procedure under the Interlocutory Appeals Act of 1958.

A. The Tables to the U. S. Code Cannot Supersede the Statutes at Large

The right of a federal agency to condemn land is a right which rests solely on statutory authority. Where the statutory authority to condemn expressly directs that condemnation proceedings "be in accordance with" a specific statute, it follows inexorably that that statute alone governs the condemnation proceedings.

Thus, 40 U.S.C. § 72 declares that the National Capital Planning Commission:

> ". . . is authorized to acquire such lands . . . by condemnation proceedings, such proceedings to acquire lands . . . to be in accordance with the provisions of act August 30, 1890, ch. 837, 26 Stat.

412, the Chief of Engineers of the Army being, for the purposes of sections 71, 72, 73 and 74 of this title, clothed with all the power vested by the said act of August 30, 1890, in the Board created."

The complaint in condemnation did not premise the jurisdiction of the district court on the act of August 30, 1890, but upon a condemnation statute which authorized the filing of a declaration taking. The district court when its jurisdiction was challenged admitted that condemnation proceedings instituted at the request of the Commission might be required to follow the Act of August 30, 1890 if that Act "were operative today" (App. pp. 5a-6a). However, ruled the court, compliance with that statute was unnecessary because the "tables" of the U. S. Code revealed that the act of August 30, 1890 "has been eliminated from the Code as being obsolete, executed and superseded". The court of appeals affirmed. In so ruling not only was the express direction of Congress ignored but also earlier rulings of this Court and the courts of appeal for the 2nd and 8th circuits were contravened.

The ruling below places the "tables" to the U. S. Code in a position superior to the Statutes at Large. Such a startling concept not only upsets established precedents but is directly *contra* to 1 U.S.C. § 112 (1952) making United States Statutes at Large "legal evidence" of the law. Not even the body of the U. S. Code which is only *prima facie* evidence of the law can prevail over the Statutes at Large. 1 U.S.C. § 204(a) (1952); *Stephan* v. *United States*, 319 U. S. 423 (1943).

The ruling below gives extra-legal effect not only to the body of the Code itself but also to the tables or ancillaries to the Code. The Committee of the Judi-

ciary of the House of Representatives prescribes the ancillaries to be included in the Code but the Librarian of Congress is directed to cooperate with the Committee in the "preparation of such ancillaries", 1 U.S.C. § 205 (1952). The content of such ancillaries, not being a legislative act, could not possibly effect a repeal of statutes embodied in the Statutes at Large.

The novel and binding effect to be given the "tables" of the U. S. Code under the precedent established, departs so radically from accepted and established judicial interpretation that this Court should examine this startling new concept before it gains wide-spread acceptance.

Of equal seriousness is that fact that even assuming the incorporated statute, the Act of August 30, 1890, had been repealed, it still would be operative as an integral part of the incorporating statute. This Court has ruled that where a statute incorporates another, amendment or repeal of the incorporated statute affects not at all the incorporating statute. *Kendall* v. *United States*, 37 U. S. (12 Pet.) 524, 625 (1838); *In re Heath*, 144 U. S. 92, 93-94 (1892). Also so holding are *United States* v. *Rainwater*, 244 F. 2d 27, 29 (8th Cir. 1957) and *United States ex rel. Kessler* v. *Mercur Corp.*, 83 F. 2d 178, 180 (2d Cir. 1938).

Here, 40 U.S.C. § 72 incorporates the Act of August 30, 1890, c. 837, 26 Stat. 412. The "effect is the same as though the [Act of August 30, 1890] had been incorporated bodily into [40 U.S.C. § 72]." *Hassett* v. *Welch*, 303 U. S. 303, 314 (1938). Even asuming a subsequent repeal of the Act of August 30, 1890, 40 U.S.C. § 72 would be unaffected. This is the rule of *Kendall* and the other cases, *supra*. The ruling below

being squarely *contra* to this well settled principle[2] a review by this Court is necessary to resolve this conflict.

B. The Interlocutory Appeals Act of 1958 Neither Amends Nor Repeals the All Writs Statute

The Interlocutory Appeals Act became law September 2, 1958. That Act permitted appeals from interlocutory orders of federal district courts formerly not appealable, and was designed to obtain appellate review of issues dispositive of the case prior to a long and time consuming trial, and thus, as Congress intended, to expedite the ultimate termination of litigation. A condition precedent to appeal of the interlocutory order is the issuance by the district court of a certificate of appealability.

Petitioner moved the district court to issue such a certificate, which motion was denied. Petitioner then filed a petition for an extraordinary writ under 28 U.S.C. § 1651 in the court below.

The United States immediately challenged the jurisdiction of the court of appeals to issue a writ under 28 U.S.C. § 1651 declaring, *inter alia,* that to "permit the use of the 'All Writs' statute in a case which, except for the lack of certificate, would be appealable under the [Interlocutory Appeals Act] would be to countenance an evasion of the Congressional limitations on such appeals." The court below by a *per curiam* order denied petitioner's application under the All Writs Statute.

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[2] It is not surprising that on amazingly similar facts, a condemnation statute incorporating another by reference, the incorporated statute stated to be "impliedly repealed" by the "compiler's notes," resulted in a decision squarely *contra* to the decision here questioned. *Potter* v. *Gardner*, 222 Ky. 487, 1 S. W. 2d 537 (1927).

The astonishing effect attributed to the newly enacted Interlocutory Appeals Act will place unfettered discretion in United States district courts to prohibit litigants from seeking an extraordinary writ under the All Writs Statute. Where as here, a litigant faces irreparable injury from an interlocutory order he would truly be without remedy if his only avenue of appellate protection, the extraordinary writ, were unavailable.

The All Writs Statute was designed to enable appellate courts to protect their jurisdiction. Thus, interlocutory orders of the court below which would, as here, permit the destruction of the very *res* in controversy, would render the case moot if the appellate tribunal were without jurisdiction to issue corrective orders under the All Writs Statute.[3] An interpretation of the Interlocutory Appeals Act which would prohibit such review would truly leave the litigant without remedy—something abhored by the law.

The far-reaching consequences of a holding that the Interlocutory Appeals Act amends the All Writs Statute are but too obvious. By refusing to issue a certificate under the former, all rights under the latter are dissipated. There is no justification for such an

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[3] As the court stated in United States v. United States District Court, 206 F. 2d 303 (9th Cir. 1953):

> "It is the claim of the United States that there is irreparable waste under the court's order of April 24, 1953, and that waste of water is destruction of the *res* of the case. We have a duty to preserve our appellate jurisdiction in the district court since we may well have to exercise it. . . . Our jurisdiction to entertain the United States' petition depends upon the necessity of our order to preserve the *res* in the appeal. It is obvious that the *res*, to the extent that water is wasted because of the district court's order, is destroyed. We therefore, hold that the United States has the right to petition us and that we have the right to entertain the petition of the United States in prohibition or mandamus. . . ." (pp. 306-307)

interpretation of the Interlocutory Appeals Act either in the legislative history or in the language of the statute itself.

Because the Interlocutory Appeals Act is a general statute which introduces a new and needed concept of finality for appeal purposes, any implication that it amends the All Writs Statute so as to deprive courts of appeals and this Court of its jurisdiction to entertain petitions under the All Writs Statute should be reviewed.[4]

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to grant this petition for certiorari.

Respectfully submitted,

PERRY S. PATTERSON
HERBERT J. MILLER, JR.
RAYMOND C. LARROCA
of
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS
800 World Center Building
Washington 6, D. C.
Attorneys for Petitioner

RODNEY M. NASH
JAMES K. EAGAN, JR.
555 Fifth Avenue
New York, New York
Of Counsel.

April 6, 1959

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[4] In Carroll v. United States, 354 U.S. 394, 414 (1957), this Court stated:

> "Since the Court of Appeals relied on precedents of general applicability to finality problems in construing the District of Columbia statutory provisions, we do not consider that this case falls within the policy that ordinarily causes us to adhere to that court's view on local law matters." (p. 414)

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,933

SEPTEMBER TERM, 1958

THE AMERICAN OIL COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA and THE HONORABLE JOHN J. SIRICA, Judge of the United States District Court for the District of Columbia, *Respondents*.

Before: EDGERTON, WILBUR K. MILLER, and FAHY, Circuit Judges.

Order

This case came on for consideration of petitioner's petition for extraordinary writ pursuant to 28 U.S.C. § 1651 and on petitioner's application for an order staying United States and its officers, agents, and employees from taking possession of certain real estate, and said petition and application were argued by counsel.

Upon consideration whereof, it is ORDERED by the court that the petition for extraordinary writ is denied.

It is FURTHER ORDERED by the court that the United States, its officers, agents, and employees are hereby restrained from taking possession of the real estate and gasoline service station located at the intersection of Wisconsin and Massachusetts Avenues, Northwest, District of Columbia, until after March 7, 1959.

Per Curiam.

Dated: February 6, 1959

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT COURT DOCKET NO. 28-58

UNITED STATES OF AMERICA, *Plaintiff*,

v.

Lot 800 in Square 1928, containing 5,967.79 square feet, more or less, in the District of Columbia, and THE AMERICAN OIL COMPANY, et al., and unknown owners, *Defendants*.

Opinion

The United States of America, plaintiff, at the request of the National Capital Planning Commission, filed an action in this court on October 9, 1958 for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest. Trial by jury of the issue of just compensation was demanded by plaintiff.

In its complaint, it is alleged that plaintiff's authority for taking is the Act of Congress of March 1, 1929 (45 Stat. 1415, et seq.), as amended, and the Acts of Congress of June 6, 1924 (43 Stat. 463) and April 30, 1926 (44 Stat. 374) as amended by the Act of July 19, 1952 (66 Stat. 781) establishing the National Capital Planning Commission, and the Act of Congress of May 29, 1930 (46 Stat. 482). The use for which the land is taken is the comprehensive development of the park, parkway and playground system of the National Capital. The property involved in this proceeding is located at the southeast corner of Wisconsin and Massachusetts Avenues, Northwest.

On the same date the complaint was filed, namely, October 9, 1958, Harland Bartholomew, Chairman of the National Capital Planning Commission filed a declaration of taking in this court stating that by direction of the Commission and pursuant to the Acts of Congress heretofore

referred to, the described property was being taken for public use and was to be used as a part of the park and parkway system in the District. The Commission estimated that the amount of $128,250.00 was just compensation for the land taken, with all buildings and improvements thereon, and all appurtenances thereto. This sum has been deposited in the registry of the Court.

In its answer defendant admits ownership of the land in question and states that, because of its strategic location at the intersection of two major highways, defendant's gasoline service station is a highly profitable enterprise that brings large profits to defendant and substantial taxes to the Federal Government and to the District of Columbia. The answer also alleges that the declaration of taking is outside the scope of the Commission's authority as set forth in 40 U.S.C. § 72 and that, in any event, the plaintiff's claim for immediate possession is unauthorized since the Commission does not presently have appropriated funds in order to convert the land for authorized public purposes. Defendant also contends that the sum of $128,250.00 estimated by the United States does not constitute just or adequate compensation for the property.

Motions Filed by Plaintiff

The plaintiff has filed four motions in the alternative: under 12 (c) of the Federal Rules of Civil Procedure for judgment on the pleadings; under Rule 12 (d) to dismiss the answer for failure to state a claim; under Rule 12 (f) to strike all of the answer except paragraph 1; or under Rule 56 for a summary judgment. Plaintiff states the grounds for these alternative motions as follows:

> "1. The Acts of Congress set forth in the Complaint constitute clear authority for the acquisition by condemnation of the lands here involved for the uses set forth therein. The allegations in defendant's an-

swer set forth erroneous assumptions or conclusions of law or fact or of law and fact.

"2. Plaintiff is entitled to possession of defendant's lands as a matter of right.

"3. The Order for Delivery of Possession was obtained according to law.

"4. The asserted objections and defenses set forth in defendant's answer do not constitute valid and legal defenses to the taking of said property or to the delivery of possession of lands herein to plaintiff and fail to set forth a valid claim upon which the relief sought by defendant, can be granted.

"5. There is no genuine issue between plaintiff and said defendant as to any material fact, and plaintiff is entitled as a matter of law to judgment on the issue of the right of the Government to condemn the lands herein involved."

The Court will treat the motion as one for summary judgment.

The defendant contends that Title 16, §§ 619-644 of the District of Columbia Code is not applicable to condemnation actions by the Commission in the absence of repeal of 40 U.S.C. § 72. Defendant further states that the mere fact that the general condemnation statute (Title 16, § 619, D. C. Code, 1951 Ed.) was passed subsequent to the enactment of 40 U.S.C. § 72 is of no legal significance.

The Court disagrees with this contention. It is the opinion of the Court that the Acts of Congress set forth in the complaint and declaration of taking constitute clear authority for the acquisition by condemnation of the property herein involved for the uses described in the complaint, and that the plaintiff is proceeding properly in this litigation.

The National Capital Park and Planning Commission Act of 1924, (43 Stat. 463) as amended, 40 U.S.C. § 70, et seq. (1952 Ed.) gives the Commission the power to condemn the property involved herein for the purpose set forth in the Complaint. Title 16, § 619 of the District of Columbia Code also relied upon by plaintiff states as follows:

> "Whenever the head of any executive department or independent bureau, or other officer of the United States, or any board or commission of the United States, hereinafter referred to as the acquiring authority, has been, or hereafter shall be, authorized by law to acquire real property in the District of Columbia for the construction of any public building or work, or for parks, parkways, public playgrounds, or any other public purpose, such acquiring authority shall be and hereby is, authorized to acquire the same in the name of the United States by condemnation under judicial process whenever in the opinion of such acquiring authority it is necessary or advantageous so to do; and in every such case the Attorney General of the United States, upon the request of such acquiring authority, shall cause a proceeding in rem for such condemnation to be instituted in the District Court of the United States for the District of Columbia, holding a special term as a District Court of the United States, which court is hereby vested with jurisdiction of all such cases of condemnation with full power to hear and determine all issues of law and fact that may arise in the same."

The Court finds that the plaintiff is proceeding legally and properly and pursuant to Title 16, §§ 619-644 of the District of Columbia Code.

However, the defendant argues that the language of 40 U.S.C. § 72 authorizing condemnation for park, parkway and playground uses by the Commission specifically re-

quires it to follow the procedures set forth in the Act of August 30, 1890, 26 Stat. 412 (formerly 40 U.S.C. § 120), which does not authorize a declaration of taking by the Commission. This contention might be correct if it could be held that the 1890 statute were operative today. However, it is not. The tables in the official edition of the U. S. Code, 1952 Edition, at page 8131, reveal that this statute has been eliminated from the Code as being obsolete and superseded. Why this was done may be understood by referring to *Willis v. United States*, 69 App. D.C. 129, 99 F. 2d 362 (1938). The late Justice Vinson there traced the history of condemnation procedure in the District of Columbia. At page 130 it is stated:

> "The statutes relative to the condemnation of land in the District of Columbia are evolutions of several prior acts of Congress. Until 1929, the same procedure was provided for both the United States and the District of Columbia . . . The Act of August 30, 1890, 26 Stat. 412, 413, § 3, 40 U.S.C.A. § 120, set out the procedure for the taking by condemnation of private property in the District of Columbia. . . . On March 1, 1929, Congress changed the method or procedure in condemnation cases in the District of Columbia. Different methods were provided for the United States (45 Stat. 1415, c. 416 (now D.C. Code, Title 16, §§ 619-644)) and for the District of Columbia (45 Stat. 1437, c. 439 (now D. C. Code, Title 16, §§ 601-604))."

Thus it is clear that D. C. Code, 16-619 et seq., is the controlling statute here and the plaintiff has conformed to its provisions.

The Court also finds that the Commission has monies available to compensate defendant for its property. At the present time there is on deposit in the registry of this court the sum of $128,250.00 which is the amount of money estimated by the Commission to be just compensation for

the property taken. Undoubtedly this money was intended by Congress for the purchase of the land involved, which is to be used for the purpose stated by the Government.

Defendants also resist the plaintiff's motion for summary judgment by asserting in both of its memoranda of points and authorities that certain genuine issues of material fact exist in this litigation. The fact issues claimed to exist are not properly set forth in the answer or by means of affidavit but are merely listed at page 7 of both of defendant's memoranda. Furthermore, this list does not consist of specific allegations or statements of fact but rather they are merely speculative questions as to what procedures might or might not have been followed by the Commission in instituting this action. By reason of their source and their nature, these questions do not form a sound basis for determining that a genuine issue of material fact exists in this case. Even factual statements made in legal memoranda or points and authorities cannot be given the dignity of allegations in the pleadings or statements made by affidavit or by deposition. *Goldman v. Summerfield*, 94 U. S. App. D. C. 209, 214 F. 2d 858 (1954). In addition, as Judge Fahy stated in *Dewey v. Clark*, 86 U. S. App. D. C. 137, 180 F. 2d 766 (1950) at page 143:

> ". . . There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment . . . formalism is not a substitute for the necessity of a real or genuine issue."

Thus, from a consideration of the pleadings, it would appear that there are no material issues of fact here.

Conclusion

The objection and defenses set forth in defendant's answer do not constitute valid and legal defenses to the taking of its property or to the delivery of possession of the

property involved herein to plaintiff and fails to set forth a valid claim upon which the relief sought by defendant can be granted. There is no genuine issue as to any material fact and the plaintiff is entitled to a judgment as a matter of law. Motion for summary judgment is granted.

Counsel for plaintiff will prepare an appropriate order in accordance with this opinion.

JOHN J. SIRICA
United States District Judge

January 22, 1959

APPENDIX B

Pertinent Statutory Provisions

1. National Capital Planning Act of 1924, Section 2, Act of June 6, 1924, c. 270, § 2, 43 Stat. 463, 40 U.S.C. § 72 (1952):

> "Said commission or a majority thereof is authorized and directed to acquire such lands as in its judgment shall be necessary and desirable in the District of Columbia and adjacent areas in Maryland and Virginia, within the limits of the appropriations made for such purposes, for suitable development of the National Capital park, parkway and playground system. Said commission is authorized to acquire such lands by purchase when they can be acquired at prices reasonable in the judgment of said commission, otherwise by condemnation proceedings, such proceedings to acquire lands within the District of Columbia to be in accordance with the provisions of Act August 30, 1890, c. 837, 26 Stat. 412, the Chief of Engineers of the Army being, for the purposes of sections 71, 72, 73 and 74 of this title, clothed with all the power vested by the said Act of August 30, 1890, in the board thereby created. . . ."

2. National Capital Planning Act of 1952, §2, Act of July 19, 1952, c. 949, 66 Stat. 791:

> "Sec. 2. Sections 2, [40 U.S.C. § 72 quoted *supra*] 3, and 4 of the Act approved June 6, 1924, as amended, shall be renumbered as sections 11, 12, and 13. Sections 1 and 2 of this Act may be cited as the 'National Capital Planning Act of 1952.'"

3. Act of August 30, 1890, c. 542, 26 Stat. 412:

> "Sec. 2. That to provide accommodation for the Government Printing Office, and the construction of the needed storage and distributing warehouses in connection therewith, the Secretary of the Treasury, the

Public Printer, and the Architect of the Capitol, acting as a board, be and they are hereby, empowered and instructed to acquire, either by purchase or by condemnation proceedings, as hereinafter provided, the land necessary, in their opinion, for the purposes aforesaid, and for the purposes stated, the sum of two hundred and fifty thousand dollars, or so much thereof as shall be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated."

"Sec. 3. That in the event it shall be necessary, in order to carry out the purpose of the foregoing section, for the board, as above constituted, to acquire land, said board is empowered and directed to acquire the same by negotiation, where any such land may and can be so acquired and title secured at a price not above a fair relative value as to other lands which have been sold in the immediate vicinity; or if the said board hereby created shall be unable to purchase said land by agreement with any one or more of the respective owners at a reasonable price within sixty days after the passage of this act they are authorized and directed to make application to the supreme court of the District of Columbia, at any general or special term thereof, by petition for the condemnation of such land not so purchased, and for the ascertainment of its value. Such petition shall contain a particular description of the property not so purchased, and selected for the purpose aforesaid, with the name of the owner or owners thereof and their residences, so far as the same may be ascertained, together with a plan of the land proposed to be taken; and thereupon the said court is authorized and required to cite all such owners and all other persons interested to appear in said court at a time to be fixed by such court, on reasonable notice, to answer the said petition; and if it shall appear to the court that there are any

owners or other persons interested who are under disability the court shall give public notice of the time at which the said court will proceed with the matter of condemnation; and at such time if it shall appear that there are any persons under disability either who have appeared or who have not appeared, the court shall appoint guardians ad litem for each such persons, and the court shall thereupon proceed to appoint three capable and disinterested commissioners to appraise the value of the respective interests of all persons concerned in such lands, under such regulations as to notice and hearing as to the court shall seem meet. Such commissioners shall thereupon, after being duly sworn for the proper performance of their duties, examine the premises and hear the persons in interest who may appear before them, and return their appraisement of the value of the interests of all persons, respectively, in such land; and when such report shall have been confirmed by the court the President of the United States shall, if he think the public interest requires it, cause payment to be made to the respective persons entitled according to the judgment of the court, and in case any of such persons are under disability, or can not be found, or neglect to receive payment, the money to be paid to any of them shall be deposited in the Treasury to their credit, unless there shall be some person lawfully authorized to receive the same under the direction of the court, and when such payments are so made, or the amounts belonging to persons to whom payment shall not be made are so deposited, the said lands shall be deemed to be condemned and taken by the United States for the public use. And hereafter, in all cases of the taking of property in the District of Columbia for public use, whether herein, heretofore, or hereafter authorized, the foregoing provisions, as it respects the application by the proper officer to the supreme court

of the District of Columbia and the proceedings therein shall be as in the foregoing provisions declared."

4. Act of March 1, 1929, § 1, c. 416, 45 Stat. 1415:

"Whenever the head of any executive department or independent bureau, or other officer of the United States, or any board or commission of the United States, hereinafter referred to as the acquiring authority, has been, or hereafter shall be, authorized by law to acquire real property in the District of Columbia for the construction of any public building or work, or for parks, parkways, public playgrounds or any other public purpose, such acquiring authority shall be, and hereby is, authorized to acquire the same in the name of the United States by condemnation under judicial process whenever in the opinion of such acquiring authority it is necessary or advantageous so to do; and in every such case the Attorney General of the United States, upon the request of such acquiring authority, shall cause a proceeding in rem for such condemnation to be instituted in the District Court of the United States for the District of Columbia, holding a special term as a District Court of the United States, which court is hereby vested with jurisdiction of all such cases of condemnation with full power to hear and determine all issues of law and fact that may arise in the same."

5. Act of July 30, 1947, c. 388, § 1, 61 Stat. 633, as amended, Act of September 23, 1950, c. 1001, § 1, 64 Stat. 979; Act of Oct. 31, 1951, c. 655, § 3, 65 Stat. 710, 1 U.S.C. § 112 (1952):

"The Administrator of General Services shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all proclamations

by the President in the numbered series issued since the date of the adjournment of the regular session of Congress next preceding; and also any amendments to the Constitution of the United States proposed or ratified pursuant to article V thereof since that date, together with the certificate of the Administrator of General Services issued in compliance with the provision contained in section 106b of this title. In the event of an extra session of Congress, the Administrator of General Services shall cause all the laws and concurrent resolutions enacted during said extra session to be consolidated with, and published as part of, the contents of the volume for the next regular session. The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States."

6. Act of July 30, 1947, c. 388, § 1, 61 Stat. 633, 1 U.S.C. § 204(a) (1952).

"(a) United States Code—The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: Provided, however, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States,

and the Territories and insular possessions of the United States. . . ."

1 U.S.C. § 205 (1952):

"The publications provided for in sections 202, 203 of this title shall be printed at the Government Printing Office and shall be in such form and style and with such ancillaries as may be prescribed by the Committee on the Judiciary of the House of Representatives. The Librarian of Congress is directed to cooperate with such committee in the preparation of such ancillaries. Such publications shall be furnished with such thumb insets and other devices, to distinguish parts, with such facilities for the insertion of additional matter, and with such explanatory and advertising slips, and shall be printed on such paper and bound in such material, as may be prescribed by such committee. July 30, 1947, c. 388, § 1, 61 Stat. 633.

7. Interlocutory Appeals Act of September 2, 1958, 72 Stat. 1770, 28 U.S.C.A. § 1292(b) (Supp. 1958).

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

8. The All Writs Statute of June 25, 1948, c. 646, 62 Stat. 944, as amended, May 24, 1949, c. 139, § 90, 63 Stat. 102, 28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

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Nos. 817, 770 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE AMERICAN OIL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA AND THE HONORABLE JOHN J. SIRICA, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR AN EXTRAORDINARY WRIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
WALTER B. ASH,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Argument	5
Conclusion	11

CITATIONS

Cases:	
Fourco Glass Co. v. *Transmirra Corp.*, 353 U.S. 222	9
Willis v. *United States*, 99 F. 2d 362	10
Statutes:	
Act of August 30, 1890, 26 Stat. 837	6, 7
Act of June 6, 1924, 43 Stat. 463, 40 U.S.C. 72	7, 8, 9
Section 2	6, 9
Act of March 1, 1929, 45 Stat. 1415, 16 D.C. Code 619–644	2–4, 7, 8
Section 1	2, 6
Section 10	3, 7
Act of July 19, 1952, 66 Stat. 781	9
All-Writs Statute, 28 U.S.C. 1651(a)	5, 11
Interlocutory Appeals Act of September 2, 1958, 72 Stat. 1770, 28 U.S.C. 1292(b)	5
Miscellaneous:	
69 Cong. Rec. 10748	8
H. Rep. 1693, 70th Cong., 1st Sess.	8
S. Rep. 1431, 70th Cong., 2d Sess.	8

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OPINIONS BELOW

The opinion of the district court (Pet. 2a–8a) is not reported. The *per curiam* order of the court of appeals (Pet. 1a) is not reported.

JURISDICTION

The order of the court of appeals was entered on February 6, 1959 (Pet. 1a). The petition for a writ of certiorari (No. 817) and the motion for leave to file petition for extraordinary writ (No. 770, Misc.) were filed on April 6, 1959. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(1) and the All-Writs Statute, 28 U.S.C. 1651(a).

QUESTION PRESENTED

Whether the Act of March 1, 1929 (45 Stat. 1415, 16 D.C. Code 619–644), which authorizes orders for possession to be entered upon declarations of taking in condemnation actions brought by the United States to acquire land in the District of Columbia, applies to a condemnation action brought by the United States on behalf of the National Capital Planning Commission.

STATUTES INVOLVED

The Act of March 1, 1929, 45 Stat. 1415, 16 D.C. Code 619–644, provides in part as follows:

> SEC. 1. Whenever the head of any executive department or independent bureau, or other officer of the United States, or any board or commission of the United States, hereinafter referred to as the acquiring authority, has been, or hereafter shall be, authorized by law to acquire real property in the District of Columbia for the construction of any public building or work, or for parks, parkways, public playgrounds, or any other public purpose, such acquiring authority shall be, and hereby is, authorized to acquire the same in the name of the United States by condemnation under judicial process whenever in the opinion of such acquiring authority it is necessary or advantageous so to do; and in every such case the Attorney General of the United States, upon the request of such acquiring authority, shall cause a proceeding in rem for such condemnation to be instituted in the District Court

of the United States for the District of Columbia, holding a special term as a District Court of the United States, which court is hereby vested with jurisdiction of all such cases of condemnation with full power to hear and determine all issues of law and fact that may arise in the same.

* * * * *

SEC. 10. The petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. * * *

* * * * *

Upon the filing of said declaration of taking and of the deposit in the registry of the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment;

but interest shall not be allowed on so much thereof as shall have been paid into the registry. * * *

* * * * * *

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. * * *

Other relevant statutes are set forth in Appendix B to the petition for certiorari.

STATEMENT

On October 9, 1958, the United States, on behalf of the National Capital Planning Commission, filed a complaint and a declaration of taking[1] in a condemnation action in the United States District Court for the District of Columbia to acquire certain property, improved by a gasoline service station, located at the southeast corner of Wisconsin and Massachusetts Avenues in Washington, D.C. (R. 1). Upon the Government's motion, the court ordered delivery of possession on January 15, 1959, but the order, subsequently extended (Misc. Pet. 1a–3a, 11a), has been stayed pending disposition of the petition for a writ of certiorari (Misc. Pet. 12a).

By its answer, petitioner challenged the validity of the order for delivery of possession, contending that the declaration-of-taking procedure was not available to the Planning Commission. On motion of the Government, the court granted summary judgment on that issue in its favor (Misc. Pet. 4a, 5a–10a). The issue

[1] Accompanied by a deposit of estimated just compensation.

of just compensation for the taking has not yet been tried.

The district court refused to certify its order sustaining the order for possession as one appropriate for immediate appeal under the Interlocutory Appeals Act of September 2, 1958, 72 Stat. 1770, 28 U.S.C. 1292(b) (R. 65). Petitioner then sought review of that order in the court of appeals by a petition for an extraordinary writ under the All-Writs Statute, 28 U.S.C. 1651(a). The court of appeals, after hearing oral argument, denied the petition by a *per curiam* order (Pet. 1a).

ARGUMENT

In this Court, petitioner seeks review by certiorari of the court of appeals' judgment denying an extraordinary writ (No. 817) or, alternatively, the issuance of an original writ by this Court (No. 770, Misc.). Our response is mainly confined to the contents of the petition for a writ of certiorari in No. 817. Any relief to which petitioner might be entitled can be fully granted by a review of the judgment of the court of appeals. There is no necessity for invoking the original process of this Court.

1. Petitioner does not challenge the right of the United States to condemn its property. It contends only that the declaration-of-taking procedure, whereby immediate possession can be obtained, was not available and hence that possession could be awarded only upon conclusion of the entire condemnation proceedings, including the determination of just compensation. That contention is without substance.

a. The Planning Commission was created in 1924. At that time, the Act of August 30, 1890, 26 Stat. 412, 413, prescribed the procedure to be followed "hereafter, in all cases of the taking of property in the District of Columbia for public use, whether herein, heretofore, or hereafter authorized" (Pet. 9a–12a). Accordingly, when the Planning Commission was created in 1924 and given authority to acquire property in the District of Columbia and elsewhere, it was authorized to acquire such property "by condemnation proceedings, such proceedings to acquire land within the District of Columbia to be in accordance with the provisions of act August 30, 1890" (§ 2, Act of June 6, 1924, 43 Stat. 463, 40 U.S.C. 72; Pet. 9a).

The 1890 Act did not contain a declaration-of-taking procedure. In 1929, however, Congress provided a new procedure for the condemnation of lands within the District of Columbia. Section 1 of the 1929 Act provided (Act of March 1, 1929, 45 Stat. 1415, 16 D.C. Code 619; *supra*, pp. 2–3):

> Whenever the head of any executive department * * *, or any board or commission of the United States * * * has been, or hereafter shall be, authorized by law to acquire real property in the District of Columbia * * * for parks, parkways, public playgrounds or any other public purpose, such acquiring authority shall be, and hereby is, authorized to acquire the same in the name of the United States by condemnation under judicial process * * *; and in every such case the Attorney General of

> the United States, upon the request of such acquiring authority, shall cause a proceeding in rem for such condemnation to be instituted * * *.

In addition to requiring such suits to be brought in the name of the United States, the Act made numerous changes from the procedure previously followed in such cases, including, for example, the creation of a right to jury trial on the issue of just compensation. In particular, § 10 of the Act expressly authorized the filing of a declaration of taking and empowered the court, upon the filing of such a declaration, to fix the time for delivery of possession (*supra*, pp. 3–4). It is the applicability of that power that is in issue here.

Strictly speaking, the issue is not whether the 1929 Act "repealed" the 1890 Act or "amended" the reference to that Act in the 1924 Act. Petitioner's contention that the 1924 Act was in no way modified by the 1929 Act would mean only that the Planning Commission is still empowered by the 1924 Act to initiate condemnation actions pursuant to the 1890 procedures; it would not follow that the 1929 Act procedures were not also available. Here, the action was brought in the name of the United States under the 1929 Act, and thus the precise issue is simply whether that Act is applicable at all to condemnation actions brought on behalf of the Planning Commission. Petitioner's technical objections that the 1929 Act failed expressly to repeal the 1890 Act

or amend the 1924 Act—though clearly without merit in any event—are therefore irrelevant.

There can be no doubt, we believe, that the 1929 Act does indeed apply to actions on behalf of the Planning Commission. Patently the Planning Commission is a "commission of the United States * * * [which] has been * * * authorized by law to acquire real property in the District of Columbia * * * for parks." Petitioner does not seriously contend otherwise, and it is difficult, in fact, to understand to whom that language might refer other than the Planning Commission. Nor is that conclusion surprising, since the Act was in fact drafted, in cooperation with the Justice Department, by the Planning Commission. 69 Cong. Rec. 10748.[2]

Since the 1929 Act itself independently authorizes condemnation proceedings in the name of the United States on behalf of the Planning Commission if the Commission "has been * * * authorized by law to acquire" such property, the only relevance of the 1924 Act is to establish the substantive authority of the Commission to "acquire" property. It is essentially irrelevant whether the 1924 Act also authorizes some other procedure for the acquisition. To the extent

[2] See also H. Rep. 1693, 70th Cong., 1st Sess., p. 2; S. Rep. 1431, 70th Cong., 2d Sess., p. 2:

"Proceedings for condemnation of land in this District for uses of the United States Government for construction of public buildings and *extension of the park and playground system of the National Capital*, have long been unsatisfactory in the matter of time occupied and for many other reasons. It is believed that this bill will, in the particulars hereinafter described, be of very material advantage." [Emphasis added.]

that the two Acts are inconsistent in their procedural provisions, the later Act necessarily controls.[3]

b. The issue, moreover, concerns solely the procedure to be followed in a limited class of condemnation proceedings (those on behalf of the Planning Commission) in the District of Columbia, and is thus an essentially "local" question appropriate for final resolution by the Court of Appeals for the District of Columbia. That court resolved this very question over 20 years ago in *Willis* v. *United States*, 99 F. 2d 362, holding the jury trial provisions of the 1929 Act (rather than the commissioner procedure of the 1890 Act) to be applicable to condemnation proceedings brought by the United States on behalf of the Planning Commission.[4] That decision, which petitioner fails to mention, has been the controlling law in the District for 20 years. This case, which challenges that decision for the first time, clearly presents no question appropriate for review by this Court.

2. The second question presented (Pet. 2, 10–12) goes to the jurisdiction of the court of appeals to issue an extraordinary writ in the circumstances of this case, and assumes (without discussion) that the

---

[3] Petitioner's contention that § 2 of the 1924 Act was reenacted when it was re-numbered as § 11 during the revision of the National Capital Planning Act in 1952 (66 Stat. 781), and hence now supersedes the 1929 Act, is frivolous. Such a formal reenactment as part of a general revision has no substantive effect. See, *e.g.*, *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 227.

[4] Although not expressly disclosed by the report of the case, the record before the court of appeals in *Willis* stated (pp. 1-2) that the case was filed "at the request of the National Capital Park and Planning Commission".

court of appeals held that it was without jurisdiction. There is nothing to indicate that the court so held, and the evidence is to the contrary. The court did not in form dismiss the petition for lack of jurisdiction. Rather, after hearing oral argument, it "denied" the petition with no indication that its action was on other than the merits. While the *per curiam* order is not explicit, we think the circumstance that the issue raised was long ago settled by the same court in the *Willis* case and in any event without substance indicates that the petition was denied simply because of its lack of merit. Whatever the basis of the court of appeals' order, however, the obvious lack of substance to petitioner's argument on the merits makes this case an inappropriate vehicle to consider the scope of the All-Writs Statute, 28 U.S.C. 1651(a).

CONCLUSION

For the foregoing reasons, both the petition for a writ of certiorari (No. 817) and the motion for leave to file a petition for an extraordinary writ (No. 770, Misc.) should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
WALTER B. ASH,
Attorneys.

MAY 1959.

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